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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 DANIEL E. ELWELL,

10 Petitioner,

11 v.

12 SCOTT FRAKES,

13 Respondent.

Case No. C08-1084RSL

ORDER DENYING  
CERTIFICATE OF  
APPEALABILITY

14 This matter comes before the Court on petitioner's "Notice of Appeal"  
15 which the Court considers a request for a certificate of appealability under 28 U.S.C.  
16 § 2253. Because petitioner filed his notice of appeal after April 24, 1996, his appeal is  
17 governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),  
18 which worked substantial changes to the law of habeas corpus. Under the amended  
19 version of 28 U.S.C. § 2253(c), a petitioner may not appeal the denial of a habeas corpus  
20 petition unless the district court or the Ninth Circuit issues a certificate of appealability  
21 identifying the particular issues that may be pursued on appeal. United States v. Asrar,  
22 116 F.3d 1268 (9th Cir. 1997).

23 To obtain a certificate of appealability, the petitioner must make a  
24 substantial showing of the denial of a constitutional right. "Obviously the petitioner need  
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26 ORDER DENYING CERTIFICATE  
OF APPEALABILITY

not show that he should prevail on the merits. He has already failed in that endeavor.” Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). Rather, he must demonstrate that the resolution of the habeas petition is debatable among reasonable jurists or that the issues presented were “adequate to deserve encouragement to proceed further.” Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Where a petition is dismissed on procedural grounds, the Court must determine whether “jurists of reason” would debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the district court’s procedural ruling was correct. Slack, 529 U.S. at 484.

Having reviewed the record in this case, including the Report and Recommendation of the Honorable Mary Alice Theiler, United States Magistrate Judge, the Court finds that the untimeliness of petitioner's challenge is not debatable among reasonable jurists. Petitioner is not, therefore, entitled to a certificate of appealability under 28 U.S.C. § 2253.

For all of the foregoing reasons, petitioner's request for a certificate of appealability is DENIED.

Dated this 15th day of April, 2009.

Robert S. Lasnik  
Robert S. Lasnik  
United States District Judge